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## COVID-19 Vaccine: Can my employer enforce a vaccine?

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As COVID-19 vaccinations are rolled out throughout Australia, many people are pondering a range of issues relating to the vaccination. For employees and employers, a critical point in question is whether or not an employer can compel an employee to “have the jab.”

### “Lawful and Reasonable” Direction

An employee has a legal obligation to comply with any direction issued by their employer if that direction is “lawful and reasonable”.

Accordingly, if an employer directs an employee that they must be vaccinated to continue to work, the question will then be whether or not that direction is “lawful and reasonable”.

### SafeWork Australia’s recommendations

All employers (and workers) have an obligation under work health and safety legislation to ensure, so far as reasonably practicable, the health and safety of others while at work.

SafeWork Australia has suggested that, for most employers, it may not be reasonably practicable to require their workers to have a vaccination in order to ensure their health and safety, particularly given that other control measures (handwashing, social

distancing, face masks) are available.

Instead, SafeWork has suggested that each employer should conduct a risk assessment to review the particular risks associated with their operation (including the type of work being performed and the likelihood of exposure to infection), the potential risk to vulnerable people and the availability and suitability of other control measures.

For example, a person working in a medi-hotel that accommodate persons who have COVID-19 would face a greater risk of exposure to infection than someone working in a private office. Therefore, it is more likely that the employer of those working in a medi-hotel would act reasonably and lawfully if they required their staff to be vaccinated.

Similarly, if an employer's staff work in close proximity to vulnerable persons or persons who are likely to suffer more if infected by COVID-19 (such as the aged or immune-suppressed people), it is more likely that a direction to be vaccinated would be found to be reasonable and lawful.

The [Fair Work Ombudsman](#) has adopted a similar approach and has stated that:

*“On its own, the coronavirus pandemic doesn’t automatically make it reasonable for an employer to direct their employees to be vaccinated against coronavirus.”* and that the *“overwhelming majority of employers”* should assume that they cannot require their employees to be vaccinated.

However, the Fair Work Ombudsman also recognises that in certain limited circumstances – such as those given in the examples above - an employer can or should require employees to be vaccinated.

## Can I say ‘no’ to getting vaccinated?

Another factor for consideration is whether or not the worker in question has a legitimate reason to resist vaccination. For example, people with allergies might justifiably argue that they should not be required to be vaccinated.

## The Case of Barber v Goodstart Early Learning

The issue of whether a direction to be vaccinated was reasonable and lawful was considered by the Fair Work Commission in a recent unfair dismissal case – *Barber v Goodstart Early Learning*. In this case, the employer – Goodstart Early Learning - introduced a policy requiring all of its employees to be vaccinated against influenza to limit the spread of influenza in their child care centres, unless the employee had reasonable medical grounds to refuse. Ms Barber declined the vaccination, and argued that she had previously suffered from an allergic reaction to a vaccine and had a “sensitive immune system”. However, she was unable to provide any medical evidence to support this.

After allowing her four months to provide medical evidence to support her position, the employer terminated Ms Barber's employment. She brought an unfair dismissal case.

The Fair Work Commission concluded that that the employer's direction was lawful and reasonable. In reaching this conclusion, the following factors were important:

- Goodstart's legal obligations including its duty of care to the children in its centres and its obligation to prevent the spread of infectious diseases;
- recommendations by the government that people working with children should receive the vaccination against influenza;
- the fact that there is an increased risk of morbidity and mortality from influenza in children under five years of age, and that children under six months of age cannot themselves receive the influenza vaccination;
- poor hygiene skills in young children, and the fact that a childcare centre was a "*melting pot in which to transmit a virus*" due to exposure to children's tears, saliva, vomit, etc;
- other control measures to limit virus transmission – such as social distancing – were not possible in a childcare centre;
- Goodstart allowed long time frames for employees to object to being vaccinated and, when any staff member objected, engaged in additional consultation; and
- Goodstart paid for the vaccination.

As Ms Barber did not have a legitimate basis for resisting the vaccination, the Fair Work Commission ultimately concluded that her dismissal was not harsh, unjust or unreasonable.

However, the Deputy President made it clear that his decision was "*relative to the influenza vaccine in a highly particular industry*". That is, the outcome may well have been different if the worker had been employed in a different industry.

## Can my employer force me to have the COVID-19 vaccination?

This decision supports the view that, in certain circumstances, an employer will be entitled to require their workers to undergo COVID-19 vaccination and, if the worker refuses (without reasonable excuse), the employer is entitled to discipline and even possibly dismiss the worker.

An employer should carefully consider the following factors before requiring workers to undergo mandatory vaccination:

- the nature of the work - whether it involves an increased risk of exposure to the virus or contact with vulnerable people;
- whether other controls, like social distancing, are possible and will reduce the risk of exposure to or transmission of the virus;

And, if an employer does consider that mandatory vaccination is reasonable and lawful, they should:

- be prepared to meet any cost associated with the vaccination;
- be prepared to consult widely with workers to explain its position; and
- be willing to allow exceptions in appropriate cases.

If you are an employer who is considering imposing a policy of mandatory COVID-19 vaccination, or a worker who is being required to undergo vaccination and has reasonable grounds to object, we recommend you seek legal advice.

[Contact our expert Employment Law](#) team to get legal advice on your rights and responsibilities.

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